

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

COMPLAINT OF AMERICAN POSTAL WORKERS
UNION, AFL-CIO

Docket No. C2012-2

**MOTION OF THE UNITED STATES POSTAL SERVICE
TO DISMISS COMPLAINT
(July 2, 2012)**

Pursuant to rule 3030.12(b), 39 C.F.R. § 3030.12(b), the United States Postal Service submits this motion to dismiss the Complaint filed on June 12, 2012, by the American Postal Workers Union, AFL-CIO. ("APWU").¹ In its Complaint, the APWU argues that the Postal Service's planned implementation of the Network Rationalization Plan, which was first announced in September 2011 and which has been the subject of proceedings in Docket No. N2012-1 since December, will violate 39 U.S.C. §§ 3661 and 3691. As set forth more fully below, the APWU's complaint misreads those provisions, and fails to set forth any issues of material fact or law that would entitle it to relief. Accordingly, the Commission should dismiss the Complaint.

BACKGROUND

On September 21, 2011, the Postal Service published an advance notice of proposed rulemaking (ANPR) in the *Federal Register* to revise 39 C.F.R. Part 121.² The proposed revisions would alter the service standards for some market dominant products, thereby permitting the Postal Service to reduce the number of facilities

¹ Pursuant to this rule, the Postal Service's Answer is deferred. If the Commission denies the Postal Service's motion or postpones disposition, the Postal Service's answer is due within 10 days of the Commission's action.

² Proposal to Revise Service Standards for First-Class Mail, Periodicals, and Standard Mail, 76 Fed. Reg. 58,433 (Sept. 21, 2011).

required to process mail. The ANPR stated that, if the Postal Service determined to go ahead with its plan, it would seek an advisory opinion from the Commission pursuant to 39 U.S.C. § 3661 and would publish a notice of proposed rulemaking. As a result of the ANPR, the Postal Service received more than 4,200 comments, including comments from the APWU.

On December 5, 2011, the Postal Service filed a request for an advisory opinion from the Commission (Request) on its proposal to revise the service standards for market dominant products. The Commission docketed the case as Docket No. N2012-1. The Request also informed the Commission that the Postal Service was conducting parallel notice-and-comment rulemaking to revise the service standards. The Request noted that, pursuant to 39 C.F.R. § 3001.72, the Request was being filed “not less than 90 days” before implementation. Request at 13. This permitted the Postal Service to begin implementation on March 5, 2012, but the Postal Service indicated that no changes to the service standards would occur before the rulemaking was complete and in no event before “some time in the first half of April 2012.”³

On December 13, 2011, the Postal Service announced a voluntary moratorium on closing Post Offices and processing plants until May 15, 2012, to provide Congress and the Administration the opportunity to enact comprehensive postal legislation. The moratorium on closing processing plants delayed the proposed service changes until after May 15, 2012. Two days later, on December 15, 2012, the Postal Service published a Notice of Proposed Rule (NPR) in the *Federal Register* proposing new

³ See Request at 13-14; see also Docket No. N2012-1, Direct Testimony of David E. Williams on Behalf of the United States Postal Service (USPS-T-1) at 15 n.16;

service standards for certain market dominant products.⁴ In response to the NPR, the Postal Service received more than 100 written comments.

On January 12, 2012, the Presiding Officer of Docket No. N2012-1 established a procedural schedule under which final briefs were to be due as late as July 20, 2012. The Postal Service moved for reconsideration of the procedural schedule, highlighting that the Postal Service's Board of Governors had "directed Postal Service management to pursue expeditious implementation of the service and operational changes" to realize the possible cost savings, and asking the Commission to set a schedule that would allow an advisory opinion by mid-April 2012.⁵ On January 31, 2012, the Commission denied the Motion for Reconsideration.⁶

Throughout the winter and spring of 2012, the Postal Service responded to hundreds of interrogatories, produced thousands of pages of documents, updated testimony and library references and participated in days of hearings before the Commission in the Docket No. N2012-1 case. During this period, the Commission and the parties were on notice that the Postal Service would update testimony and supporting documentation once it published its final rules on service standard revisions. See Order No. 1301 at 2.

On April 25, 2012, the United States Senate passed S. 1789, which included provisions regarding service standards for some market dominant products, such as language restricting the Postal Service's ability to reduce the overnight delivery standard for First-Class Mail and Periodicals that originate and destinate in the same

⁴ Service Standards for Market-Dominant Mail Products, 76 Fed. Reg. 77,942 (Dec. 15, 2011).

⁵ Docket No. N2012-1, Motion for Reconsideration at 3.

⁶ Docket No. N2012-1, Order No. 1183.

geographic area served by a single sectional center facility and that are entered before the critical entry time (Intra-SCF Mail).⁷

On May 17, 2012, the Postal Service announced its intention to move forward with implementing new service standards for market dominant products and consolidating its network.⁸ The changes, however, will now be implemented in two phases. The Postal Service stated that, on July 1, 2012, it would implement the first phase, which generally mirrors the language in S. 1789 regarding Intra-SCF Mail. The second phase will be implemented on February 1, 2014, unless the circumstances of the Postal Service change. The Postal Service published its final rule adopting this phased implementation plan on May 25, 2012 (Final Rule).⁹

On May 24, 2012, the Commission issued Order No. 1353, requesting information concerning the modifications from the proposal filed on December 5, 2012 as compared with the Final Rule. Order No. 1353 noted that the original proposal and the Final Rule “share many similarities,” but that the Final Rule “includes additional information that appears to supersede” testimony that the Postal Service submitted in Docket No. N2012-1. Order No. 1353 at 1. The Commission requested that the Postal Service file “up-to-date information” in Docket No. N2012-1, but did not suggest that the modifications were significant enough to render moot the original request, nor that it should close Docket No. N2012-1 and order the Postal Service to file a new request for

⁷ S. 1789, 112th Cong. § 201 (2012). The House of Representatives has not passed complementary legislation, and so these provisions have not yet been signed into law.

⁸ Postal Service Press Release PR 12-058, *Postal Service Moves Ahead with Modified Network Consolidation Plan* (May 17, 2012).

⁹ Revised Service Standards for Market-Dominant Mail Products, 77 Fed. Reg. 31,190 (May 25, 2012) (to be codified at 39 C.F.R. pt. 121). The APWU incorrectly identifies May 21, 2012, as when the Postal Service published its Final Rule in the *Federal Register*.

an advisory opinion. *Id.* In fact, the Commission announced that it “intends to adhere to the original procedural schedule in [the N2012-1] docket.” *Id.* at 2.

On June 12, 2012, with Docket No. N2012-1 nearing resolution but still pending, the APWU filed the instant Complaint with the Commission, docketed as Docket No. C2012-2, requesting that the Commission issue a permanent injunction against the Postal Service implementing the Final Rule. The following day, June 13, 2012, the APWU filed an Emergency Motion requesting expedited relief, *i.e.*, seeking a preliminary injunction against implementation of the Final Rule. On June 20, 2012, the Postal Service responded to the Emergency Motion, arguing, as it does here, that the Complaint is meritless, and also arguing that no provision of law would entitle the APWU to a preliminary injunction in any event. Each side filed an additional responsive pleading. On June 29, 2012, the Commission denied the APWU’s motion, concluding among other things that the APWU was unlikely to prevail on the merits of its Complaint.

RELEVANT LEGAL STANDARDS

Pursuant to 39 U.S.C. §3662(a), any person “may lodge a complaint with the Postal Regulatory Commission in such form and manner as the Commission may prescribe.” The Commission’s Rules of Practice and Procedure prescribe the form of the initiation of a complaint. Under those rules, a complaint must, among other things:

- “Set forth the facts and circumstances that give rise to the complaint,” 39 C.F.R. § 3030.10(a)(1);
- “Clearly identify and explain how the Postal Service’s action or inaction violates applicable statutory standards or regulatory requirements,” *id.* §3030.10(a)(2);

- “State the nature of the evidentiary support that the complainant has or expects to obtain during discovery to support the facts alleged in the complaint,” *id.* § 3030.10(a)(5); and
- “State whether the issues presented are pending in or have been resolved by an existing Commission proceeding or a proceeding in any other forum in which the complainant is a party; and if so, provide an explanation why timely resolution cannot be achieved in that forum,” *id.* § 3030.10(a)(7).

Within 20 days after a complaint is filed, the Postal Service generally must either file an answer or a dispositive motion. *Id.* § 3030.12.

Within 90 days after a complaint is filed, the Commission must either dismiss the complaint or, upon a finding that the complaint “raises material issues of fact or law, begin proceedings on such complaint.” 39 U.S.C. § 3662(a); *accord* 39 C.F.R. § 3030.30(a). If, at the conclusion of that proceeding, it finds the complaint to be “justified,” it may take appropriate action to remedy the noncompliance. 39 U.S.C. § 3662(c).

Accordingly, the issue before the Commission here is whether the APWU's Complaint both satisfies the procedural requirements of 39 C.F.R. § 3030.10(a) and raises material issues of fact or law warranting the initiation of complaint proceedings.

ARGUMENT

The APWU's Complaint makes three arguments: (1) that 39 U.S.C. § 3661 requires the Postal Service to receive and consider, not merely request, an advisory opinion from the Commission before implementing its network consolidation plan, APWU Complaint ¶¶ 58-61; (2) even if Section 3661 does not require the Postal Service

to receive an advisory opinion, the modifications to the plan – *i.e.*, the so-called “New Rule” of May 2012 – differ from the original proposal of December 5, 2011, and therefore require the Postal Service to request a new advisory opinion, *id.* ¶¶ 56-57; and (3) the plan itself violates Chapter 36 of Title 39 because the Postal Service failed to adequately consider the factors or meet the objectives of 39 U.S.C. § 3691, *id.* ¶¶ 62-63. We address each argument in turn below, and demonstrate why none of these arguments can survive a motion to dismiss.

I. SECTION 3661 DOES NOT REQUIRE THE POSTAL SERVICE TO OBTAIN AN ADVISORY OPINION BEFORE IMPLEMENTING A NATIONWIDE SERVICE CHANGE; IT REQUIRES THE POSTAL SERVICE TO “REQUEST” SUCH AN OPINION “WITHIN A REASONABLE TIME” BEFORE IMPLEMENTATION, AND IT DID SO.

A. The Plain Language of Section 3661 and the Commission’s Implementing Regulations Require the Postal Service to “Request,” Not “Receive,” an Advisory Opinion.

The APWU’s argument that the Postal Service cannot implement a change in its service standards without first *obtaining* an advisory opinion is belied by the language of Section 3661(b). That provision makes clear that, before implementing a change in postal services that will affect service on a nationwide basis, it “shall submit a proposal” to the Commission “*requesting* an advisory opinion on the change.” 39 U.S.C. § 3661(b) (emphasis added); *accord* 39 C.F.R. § 3001.72 (Postal Service must “file . . . a formal request for such an opinion”). Here, there is no dispute that the Postal Service submitted a request for an advisory opinion on December 5, 2011, and this request is the subject of Docket No. N2012-1, still pending before the Commission. The APWU points to nothing in the language of Section 3661(b) even suggesting that the Postal Service must *receive* the Commission’s advisory opinion before it may implement its

proposal. Where the language of a statute is clear and unambiguous, that is the end of the inquiry. See, e.g., *United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1238 (D.C. Cir. 2008).

Further, the APWU's reading is foreclosed by Section 3661(b)'s additional command that such request must be submitted "within a reasonable time prior" to the proposal's effective date. Unlike other provisions of Title 39,¹⁰ Section 3661 does not impose on the Commission a deadline by which it must issue its opinion – in fact, the statute does not require the Commission to issue an advisory opinion at all.

Accordingly, if the APWU were correct that the Postal Service must receive an advisory opinion before implementing a nationwide service change, then the requirement that the Postal Service submit the request "within a reasonable time prior" to the proposal's effective date would be rendered superfluous, because no service change could ever be implemented until the Commission issued a decision. Such an interpretation would violate a bedrock principle of statutory construction that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1094 (2011) (quoting *TRW Inc. v. Andrews*, 541 U.S. 19, 31 (2001)).

Similarly, the Commission's implementing regulations provide that the Postal Service must file its request for an advisory opinion "not less than 90 days in advance of the date on which the Postal Service proposes to make effective the change." 39 C.F.R. § 3001.72. This regulation also would be wholly unnecessary if the Postal

¹⁰ See, e.g., 39 U.S.C. § 3622(d)(1)(E) (Commission must issue determination on request for exigent rate increase within 90 days); *id.* § 3653(b) (Commission must issue annual compliance determination within 90 days after receiving submissions);

Service were required to wait for the Commission's decision before implementing a service change.

Because the meaning of Section 3661 and its implementing regulations is clear, it is hardly surprising that Chairman Goldway confirmed, in a Commission public meeting on March 14, 2012,¹¹ that the Postal Service need not wait for an advisory opinion before implementing a service change such as the one at issue in this case.¹² The Complaint points to nothing in the statute calling this conclusion into question.

B. Other Statutory Provisions Support the Plain-Language Interpretation of Section 3661.

As noted above, when the language of a statute is clear, the Commission need not inquire further into Congress's intent. However, other contemporaneously enacted provisions of Title 39 show that Congress knows how to place limits on the Postal Service's authority to implement changes and that its decision not to do so in Section 3661 was no accident.

For example, at the same time it enacted Section 3661 in 1970, Congress enacted separate provisions governing Commission input on postal rates and classes.¹³ These provisions allowed the Postal Service's Board of Governors to determine the date on which modifications to postal rates or fees (or in the mail classification

¹¹ Notice of Sunshine Act Meetings, 77 Fed. Reg. 12,889 (Mar. 2, 2012).

¹² See http://www.youtube.com/watch?v=V0_ZD_sWTZg (Mar. 14, 2012); accord James Cartledge, Hopes of a Senate hearing for US postal reform "within weeks," Post & Parcel, Mar. 14, 2012, available at <http://postandparcel.info/46411/news/companies/hopes-of-a-senate-hearing-for-us-postal-reform-within-weeks/>.

¹³ See Postal Reorganization Act sec. 2, §§ 3621–3641, 84 Stat at 760-64. These provisions were altered in 1976, and were repealed or substantially rewritten in 2006, see Postal Accountability and Enhancement Act ("PAEA"), Pub. L. No. 109-435, sec. 201, 203, 120 Stat. at 3200-05, 3207-09, but, as contemporaneously enacted provisions, they can still help to shed light on the meaning of § 3661.

schedule) would take effect,¹⁴ but only after the Postal Service first requested *and received* a “recommended decision” from the Commission on the Postal Service’s proposed changes.¹⁵ These provisions did not require the Postal Service to submit its request a “reasonable time” (or any other set period of time) before implementation; there was no need for such a provision because implementation could not occur before the Commission issued its recommended decision after a hearing.¹⁶ By contrast, Section 3661 does not condition the implementation of a service change on the Commission’s issuance of an advisory opinion. Rather, the plain language of Section 3661 permits the Postal Service to move forward in the absence of an advisory opinion, so long as the effective date of the service change has arrived and a reasonable time has elapsed.¹⁷

Similarly illuminating is 39 U.S.C. § 404(d), enacted as part of the PRA Amendments of 1976, which requires the Postal Service to provide written notice of its intent to close or consolidate a Post Office “at least 60 days prior to the proposed date

¹⁴ PRA sec. 2, § 3625, 84 Stat. at 762.

¹⁵ *Id.* §§ 3622(a), 3623(b), 3624(a), 3625, 84 Stat. at 760-62. *Accord, e.g., Dow Jones & Co. v. U.S. Postal Serv.*, 110 F.3d 80, 82 (D.C. Cir. 1997) (Postal Service can modify rates “only on the basis of a recommended decision by the Commission”).

¹⁶ The statute did require the Commission to “promptly” consider the proposal. *Id.* § 3624(a), and further created a safety valve that authorized the Postal Service to implement “temporary changes” to rates and classes if the Commission did not issue a decision within 90 days. PRA sec. 2, § 3641(a), 84 Stat. at 763. Such temporary changes could continue in effect for however long it took the Commission to issue its decision. No similar safety valve exists in § 3661 because none was necessary; the statute does not require the Postal Service to obtain an advisory opinion before implementing a service change.

¹⁷ If § 3661 were interpreted to require the Postal Service to refrain from implementing a service change until the Commission issued an advisory opinion, that would mean that Congress intended to give the Commission vastly *greater* power to delay or prevent the implementation of service changes governed by § 3661 than to delay or prevent rate, fee, and classification changes governed by §§ 3621–41. *See supra* note 16. That would make no sense, particularly because rate, fee, and classification changes were at the core of the Commission’s responsibilities and its decisions on those subjects were generally *binding*, see PRA sec. 2, § 3625, 84 Stat. at 762, whereas decisions about service changes were entrusted to postal management, and the PRC was empowered only to issue non-binding advisory opinions on service changes, 39 U.S.C. § 3661(b).

of such closing or consolidation.” 39 U.S.C. § 404(d)(1). Any person served by such Post Office can appeal the Postal Service’s decision to the Commission, which has 120 days to make a decision. *Id.* § 404(d)(5). Congress expressly empowered the Commission to “suspend the effectiveness of the determination of the Postal Service until the final disposition of the appeal.” *Id.* Section 404(d) confirms that, when Congress provides for Commission review of a Postal Service decision, the Postal Service is not automatically constrained from implementing the decision until the Commission completes its review. Rather, if the proposed date of closing or consolidation arrives during the pendency of a Section 404(d) appeal, the Postal Service is entitled to move forward unless it is prevented from doing so by an intervening order of the Commission. The fact that Congress authorized the Commission to “suspend the effectiveness of” a planned closure under Section 404(d), but did not include such authorization for service changes under Section 3661, shows that Congress did not intend the Commission to have the power to delay implementation of a service change so long as the Postal Service submitted the change to the Commission a “reasonable time” (*i.e.*, not less than 90 days) before its planned implementation date.¹⁸

C. Interpreting Section 3661 By Its Terms Would Not Defeat the Purpose of the Statute.

The APWU asks the Commission to ignore the language of Section 3661(b), asserting that a plain-language interpretation would render the Commission’s role “nugatory.” Complaint ¶ 60. This concern is unfounded. First, much of the value of the

¹⁸ *Wojciechowicz v. United States*, 582 F.3d 57, 74 (1st Cir. 2009) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

Section 3661 process, as well as the rulemaking proceeding, is in the exchange of views and information by the Postal Service and its stakeholders. That exchange has been taking place for more than six months since the Postal Service submitted its proposal, as the Complaint itself alleges.¹⁹ Accordingly, the APWU cannot seriously contend that it has not had an opportunity to be heard. Second, the Postal Service—largely as a product of the give-and-take mentioned above—has elected to implement its network rationalization plan in two discrete phases, with the final and more significant phase not occurring until February 2014, presumably long after the Commission has rendered its advisory opinion in Docket No. N2012-1. It accordingly will have the benefit of the Commission’s opinion, and will consider it before final implementation of the totality of the Postal Service’s network rationalization plan. Finally, the proceedings in Docket No. N2012-1 will continue after implementation of the first phase of the plan, and even the APWU concedes that, if the Postal Service chooses to do so, it can adapt its service standard changes based on the Commission’s opinion once it is issued.²⁰

Moreover, there is nothing absurd about the way that Congress structured the statute. It furthers the principle underlying Title 39 that the responsibility for making major operational decisions to effectuate the Postal Service’s statutory mission rests principally with the Postal Service itself, *see infra* at 21-22, and directs that the Commission should have a purely advisory role regarding nationwide service changes. 39 U.S.C. § 3661. The APWU seemingly believes that these roles should be reversed,

¹⁹ Complaint ¶ 12 (noting that the Postal Service has been served with more than 1,000 interrogatories); *id.* ¶¶ 17-20 (summarizing the testimony of 17 witnesses who provided responsive testimony); *id.* ¶ 23 (92 questions were posed by the Commission); *id.* ¶¶ 39 & 47 (Postal Service solicited comments before and after its proposed rulemaking).

²⁰ See Complaint ¶ 64 (recognizing that the Postal Service can seek “to undo the changes it had already made in response to the Commission’s Advisory Opinion”).

with the Commission having an essentially open-ended veto over any proposed service change, which can be exercised simply by withholding the issuance of an advisory opinion. The APWU is free to make that argument, but it must address it to Congress, not here in the guise of construing the statute. Section 3661 gives the Commission the power (although not the duty) to advise. It does not grant the Commission the power to stop the planned implementation of a proposed change, it does not require the Governors to heed the Commission's advice, and it does not require the Postal Service to suspend a planned change (so long as a "reasonable time" has elapsed) simply because the Commission has not issued an opinion. It requires the Postal Service to request an advisory opinion within a "reasonable time" before the proposal's implementation date. If it meets these requirements, it may go forward with its proposal.

D. The Postal Service Has Complied With the Terms of Section 3661.

There is no question that the Postal Service "requested" an advisory opinion on December 5, 2011. The APWU's Complaint asserts in passing that the Postal Service's request was not made "a reasonable time" before implementation, APWU Complaint ¶ 5, but it neither "[s]et[s] forth the facts and circumstances" supporting the assertion, 39 C.F.R. § 3030.10(a)(1), nor "[c]learly identif[ies] and explain[s]" how the request "violates applicable statutory standards or regulatory requirements," *id.* §3030.10(a)(2). Moreover, the APWU does not assert in either its "Violations of the Act" section, Complaint at 25-28, or in its "Request for Relief" section, *id.* at 28-29, that the Postal Service violated the "reasonable time" requirement. Accordingly, this vague assertion is insufficient to survive a motion to dismiss.

Even if this vague allegation were sufficient to raise the issue, it must fail. The APWU's motion for emergency relief attempted to articulate a "reasonable time" theory, relying on the Commission's regulation that a proposal be filed "not less than 90 days" before implementation. 39 C.F.R. § 3001.72. The APWU argued that this phrase establishes a floor (90 days) but not a ceiling (unlimited), and that the Commission can establish as "reasonable" any period of time it chooses on a case-by-case basis during the pendency of a given request.

Even had the APWU's Complaint raised this argument, it is simply a variant of its other arguments that the text and structure of Section 3661 are meaningless and that the Commission should be given a type of de-facto veto power – this time not by withholding an advisory opinion, but by declaring that a "reasonable time" is whatever amount of time the Commission needs to issue that opinion. The plain language of the statute again forecloses the APWU's approach. Section 3661(b) is directed to the Postal Service and sets forth what it must do *at the time it submits a request*. If 90 days were only a floor and not a ceiling, and if the Commission were empowered to declare after the filing what a "reasonable time" is, then the Postal Service would never have any way of knowing, for any given service change, how far in advance it would be required to submit its request. The Postal Service thus would have no way of complying with the statute. Additionally, such a rule would frustrate the Postal Service's ability to plan and budget for such changes because it could not know in advance when the changes would be implemented or the financial impact that such changes would be expected to have.

As a regulated entity that is expected to comply with a statutory or regulatory directive, the Postal Service is entitled to know in advance what it is required to do.²¹ A rule requiring the Postal Service to file a request 90 days before implementation (or more, if it chooses) achieves that notice and certainty while being consistent with the text of Section 3661 and its implementing regulations. The position apparently advocated by the APWU, which allows the Commission to wait until after a filing before deciding how much time is reasonable, does not.

In any event, the Postal Service's implementation comes far more than 90 days after its request for an advisory opinion. Although the Postal Service argued at the time of submission—over the objection of no one—that it could move forward 90 days later,²² it stated that it would not implement its proposal until it completed the rulemaking affecting 39 C.F.R. Part 121, which it then expected to be completed by mid-March 2012.²³ As it turned out, the rulemaking ended in mid-May, and the Postal Service will go forward with its first phase of the plan on July 1, 2012—210 days after its request—and will go forward with the final phase on February 1, 2014—790 days after its request.

Because the Postal Service complied with both requirements set forth in Section 3661(b), and because well over 90 days (in fact, more than six months) have passed since the Postal Service submitted its request, the statute allows the Postal Service to proceed with its network rationalization plan.

²¹ See *Christopher v. SmithKline Beecham Corp.*, 567 U.S. ___, 2012 WL 2196779, at *9 (U.S. June 18, 2012) (“It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance”).

²² Request at 13.

²³ *Id.* at 13-14.

II. THE MAY 2012 DECISION OF THE POSTAL SERVICE TO IMPLEMENT THE SERVICE CHANGE IN PHASES DID NOT REQUIRE IT TO SUBMIT A NEW REQUEST FOR AN ADVISORY OPINION.

The APWU also argues that the modification to the plan that gave rise to the Postal Service's December 5 proposal required it to abandon its initial request and initiate a brand new request for an advisory opinion. Complaint ¶¶ 56-57. This argument fares no better. Even assuming that there may be circumstances in which subsequent modifications to a proposal are so dramatic that they can be tantamount to an abandonment of an original proposal and a replacement with a new proposal, the APWU does not come close to establishing such circumstances here.

The overarching difference between the proposed service standards submitted to the Commission in December 2011 and those in the May 2012 Final Rule is the phased implementation schedule. APWU Complaint ¶ 33. In the December proposal, the Postal Service stated that it expected to implement the new service standards in early April 2012, after the end of the rulemaking (which it then expected to end by mid-March) to amend 39 C.F.R. Part 121.²⁴ The rulemaking ended in mid-May, at which time the Postal Service announced that, rather than implement the new service standards in one fell swoop, it would do so incrementally. Specifically, it would implement the standards in two discrete phases: an initial (and limited) phase in July 2012, and a final phase in February 2014.²⁵ The service standards remain fundamentally the same as those the Commission is presently reviewing in Docket No. N2012-1, other than the fact that final implementation will take place in February 2014 rather than April 2012. The type of

²⁴ See Request at 13-14.

²⁵ Revised Service Standards for Market-Dominant Mail Products, 77 Fed. Reg. 31190, 31192 (May 25, 2012) (to be codified at 39 C.F.R. pt. 121).

change that could support a claim that the Postal Service has effectively abandoned its original proposal and has replaced it with something fundamentally different is not present here.

The APWU's Complaint baldly asserts that the Postal Service must seek a new advisory opinion concerning the gradual implementation schedule, Complaint ¶¶ 56-57, but offers no factual or legal support for its assertion, and therefore runs afoul of the Commission's rules governing complaints. See 39 C.F.R. §§ 3030.10(a)(1), (a)(2), & (a)(5). Moreover, the legal theory it now apparently espouses—that a change in implementation date is tantamount to an abandonment of a proposal and requires the Postal Service to submit a new proposal under Section 3661—is belied by its own actions. Under the APWU's theory, Docket No. N2012-1 is moot. The APWU has not asked the Commission to dismiss that case as moot, however, even though it admits to knowing since January that the implementation schedule set forth in the Postal Service's December 2011 request²⁶ would be delayed, APWU Complaint ¶ 48, and to knowing since May that the service standards would be implemented in two phases. Complaint ¶¶ 7, 49. In fact, the APWU has continued to actively participate in that case.

In addition, the APWU's Complaint runs afoul of 39 C.F.R. § 3030.10(a)(7), which requires a complaint to "state whether the issues presented . . . have been resolved by an existing Commission proceeding . . . and if so, provide an explanation why timely resolution cannot be achieved in that forum." The Complaint neglects to mention that, when the Commission was informed of the Postal Service's plan for a two-phase implementation, it asked for additional information so that its advisory role would be

²⁶ See Request at 13-14.

“most informative to the Postal Service, Congress, and users of the mail.” Order No. 1353 at 1. The Commission did not suggest that the phased implementation of the network rationalization plan was so fundamentally different from its original proposal that it may warrant dismissal of the entire proceeding in Docket No. N2012-1, and it also did not state that the new implementation schedule required the Postal Service to file a new request. In fact, the Commission stated that it could consider and incorporate the evidence concerning the modified implementation plan within the “original procedural schedule” in Docket No. N2012-1. *Id.* In other words, far from questioning whether the modifications would warrant termination of its consideration of the Postal Service’s request, the Commission correctly recognized that the modifications should not even delay its consideration of the plan, and it implicitly concluded that the modifications did not call into question the efficacy of the Postal Service’s December 2011 request.

Finally, the APWU’s theory, if accepted, would undermine the primary utility of both the rulemaking process and the advisory-opinion proceeding. These proceedings are designed to be dynamic; they give interested parties an opportunity to exchange evidence and comments and to have the Postal Service consider them. In fact, the Postal Service’s decision to implement its plan more gradually and in two phases was the result of suggestions by Postal stakeholders. If such revisions were to be deemed an abandonment of an earlier request for an advisory opinion, the Postal Service—particularly in matters such as the instant one where time is of the essence—would have every incentive to ignore all arguments for even the slightest modifications, knowing that any change would require the Postal Service to delay implementation and to start the Section 3661 process anew. This would not only disserve the Section 3661

and rulemaking processes, it would result in a waste of the time and resources already devoted to this matter by the Commission, the Postal Service, and other stakeholders.

III. THE ASSERTION THAT THE POSTAL SERVICE'S PLAN VIOLATES 39 U.S.C. § 3691 IS AT THE CORE OF DOCKET NO. N2012-1, WHICH WAS FILED SEVEN MONTHS AGO AND IS PENDING BEFORE THE COMMISSION AND THUS NEED NOT BE ADDRESSED HERE; IN ANY EVENT, THIS ASSERTION IS INADEQUATE TO RAISE A GENUINE ISSUE OF FACT OR LAW.

Finally, the APWU's complaint baldly states that the Postal Service has failed to prove that its network rationalization plan's proposed change in service standards "meets the objectives" or "has taken into consideration the factors" set forth in Section 3691. Complaint ¶¶ 62-63 & pp. 28-29. Section 3691 required the Postal Service, within 12 months after the enactment of the PAEA in 2006, to establish service standards that "shall be designed to achieve" four objectives set forth in Section 3691(b) and further provides that, in "establishing or revising such standards," the Postal Service must take eight enumerated factors into account. 39 C.F.R. § 3691(c).

The APWU's argument is deficient in several respects. First, the dispute over the plan's compliance with Section 3691 is at the heart of Docket No. N2012-1, and is therefore "pending in . . . an existing Commission proceeding." 39 C.F.R. § 3030.10(a)(7). Accordingly, the APWU's Complaint is required to "provide an explanation why timely resolution cannot be achieved in that forum," *id.*, and it fails to do so. Second, the Complaint reverses the burden of proof. As the complaining party, it is the APWU's burden to allege (and ultimately prove) how the Postal Service's plan violates the statute. A bare assertion that there is no evidence that the plan does not violate the statute is insufficient to raise an issue of material fact or law.

Indeed, the facts that are alleged in the Complaint are in considerable tension with any allegation that the Postal Service failed to consider the factors in Section 3691. For example, the Complaint alleges that the Postal Service's proposal is "extremely lengthy, technical and complex," and its request for an advisory opinion was "accompanied by the written testimonies of 13 witnesses, 34 public library references and 5 non-public library references." Complaint at 4 & ¶ 10. Absent some further explanation, which this Complaint lacks, it is impossible to square these factual allegations with any claim that the Postal Service failed to consider the relevant factors. The same may be said regarding the proposed plan's alleged failure to "meet the objectives" of Section 3691, and that allegation suffers from an additional flaw: it misstates the legal standard. The statute requires the service standards not to "meet" the statutory objectives, but to be "designed to meet" these objectives. 39 U.S.C. § 3691(b)(1). The complaint does not allege that the proposed service standards are not designed to meet those objectives, let alone point to supporting evidence, and the allegations set forth in the Complaint would not permit such a finding.²⁷

At bottom, the Complaint's true allegation is not that the Postal Service's plan failed to be designed to achieve the objectives or to balance the relevant factors. Rather, the APWU objects to the balance that the Postal Service struck. This much is plain from the primary harms that the Complaint alleges that the APWU will suffer – its members will "have to adjust their production and delivery schedules" and their "work schedules and employee reporting times." Complaint ¶¶ 55-56; see also Emergency Mot. at 6 (arguing that employees "will have to change their work schedules and home

²⁷ The Complaint also fails to even address the fact that the Request itself explained how the Postal Service considered the factors in § 3691(c) and developed a plan designed to achieve the objectives in § 3691(b). See Request at 7-11.

schedules to conform to the new work schedules at processing facilities,” with consequent “financial and home life impacts”). Not only do these articulated harms indicate that the APWU’s concern is over the balance the Postal Service struck between competing factors, they also strongly suggest that this entire Complaint is largely a veiled attempt by the APWU to litigate before the Commission its labor-relations concerns regarding the consolidation of Postal Service processing plants. Such concerns are plainly beyond the scope of Section 3662, which does not extend to labor-relations matters.²⁸ Those concerns must be addressed under the National Labor Relations Act, either by invoking the arbitration clause in the relevant collective bargaining agreement or by filing suit in district court.²⁹

In any event, the Commission’s role is not to substitute its judgment for that of the Postal Service regarding how the factors ought to be balanced. Congress has given the Postal Service both the authority and the flexibility to manage its operations and to determine the methods and deploy the personnel necessary to conduct these operations. 39 U.S.C. § 1001(e). Its mandate includes: the planning, development, promotion and provision of adequate and efficient postal services, 39 U.S.C. §§ 403(a) & 3661(a); maintaining an efficient nationwide system of mail collection, handling,

²⁸ 39 U.S.C. § 3662(a) provides that complaints may be filed by persons who believe that “the Postal Service is not operating in conformance with the requirements of the provisions of sections 101(d), 401(2), 403(c), 404a, or 601” Consistent with § 505(b) of the PAEA, none of the enumerated provisions address labor issues. See Pub. L. No. 109-435, sec. 505(b), 120 Stat. 3236 (2006) (nothing in the Act “shall restrict, expand, or otherwise affect any of the rights, privileges, or benefits of either employees of or labor organizations representing employees of the United States Postal Service under chapter 12 of title 39, United States Code, the National Labor Relations Act, any handbook or manual affecting employee labor relations within the United States Postal Service, or any collective bargaining agreement”).

²⁹ 29 U.S.C. § 185 (“Suits for violation of contracts between an employer and a labor organization representing employees . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.”).

sorting, transportation and delivery, *id.* §403(b)(1) and 404(a)(1); and providing “types of mail service to meet the needs of different categories of mail and mail users,” *id.* § 403(b)(2). It is authorized to adopt, amend and repeal such rules and regulations that are consistent with its statutory charter as may be necessary to execute its authorized functions. *Id.* § 401(2). And it has further been granted “specific powers,” among others, to “provide for the collection, handling, transportation, delivery, forwarding, returning, and holding of mail,” and “to determine the need for post offices, postal and training facilities and equipment, and to provide such offices, facilities, and equipment as it determines are needed.” 39 U.S.C. § 404(a)(1), (3). Thus, Congress has explicitly given the Postal Service the power to determine what processes and locations would best and most efficiently meet the needs of the service and that would achieve the objectives of Section 3691(b). Inherent in that power is the flexibility to strike a balance among the factors of Section 3691(c) without needless second-guessing.

CONCLUSION

Based upon the foregoing, the Commission should dismiss the APWU's Complaint with prejudice.

Respectfully submitted,

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